

ORIGINAL

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2013-^{CT}CP-02081-SCT

**RICKEY STURKEY A/K/A RICHARD STURKEY
A/K/A RICKEY LEE STURKEY**

V.

STATE OF MISSISSIPPI

FILED
APPELLANT

APR 13 2015

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS
APPELLEE

PETITION FOR WRIT OF CERTIORARI

Comes Now Appellant, Rickey Sturkey, by and through herself, and moves this court pursuant to Miss. R. App. P. 17 to grant his Petition for Writ of Certiorari in the above styled cause and in support of his motion would show the following:

THIS CASE SHOULD BE DECIDED BY THE SUPREME COURT BECAUSE IT

INVOLVES FUNDAMENTAL ISSUES OF BROAD PUBLIC IMPORTANCE

REQUIRING DETERMINATION BY THE SUPREME COURT

1. THE CONTROLLING FACTS

The state's version of the evidence presented was that following an introduction by a confidential informant, Sturkey sold four "eight balls of crack cocaine" to an agent with the Mississippi Bureau of Narcotics (MBN). According to the testimony by the police, the MBN agent was wearing a microphone during the transaction. There was no video. Additional law enforcement officers were nearby in a audio surveillance van but not within sight of the alleged sales. Sturkey went to trial during October 2003. The MBN agent identified Sturkey as the man who sold him crack cocaine. One of the law enforcement officers in the surveillance van testified that he was familiar with Sturkey's voice. He

identified Sturkey's voice while listening to the transmission from the MBN agent's microphone. No video evidence was presented. The prosecution did not elicit any testimony regarding the precise time that the drug transaction occurred on April 18, 2001.

Sturkey testified in his own defense. Relying on an alibi defense, Sturkey asserted under oath that he had taken his car to a shop for repairs, and he and the mechanic had gone fishing afterward. Sturkey's wife testified, under oath, that there had been no drug transaction at her and Sturkey's mobile home on the date alleged by the prosecution, because no men had visited their home that date. Ultimately, the jury found Sturkey guilty of selling cocaine. The circuit court found that he qualified for enhanced sentencing as a repeat drug offender and a habitual offender as contemplated by Mississippi Code Annotated section 99-19-81 (Supp. 2014), because he had two prior convictions for selling cocaine. Consequently, the circuit court sentenced Sturkey to sixty years in the custody of the Mississippi Department of Corrections without any possibility of parole or early release. Represented by a different attorney, Sturkey filed a direct appeal. *Sturkey v. State*, 946 So. 2d 790, 791 (J1) (Miss. Ct. App. 2006). Sturkey raised three issues on direct appeal. According to Sturkey, the circuit court erred when it: (1) deprived him of his right to be represented by his attorney of choice; (2) sustained the prosecution's hearsay objection regarding a purported statement by the confidential informant, who did not testify at trial; and (3) overruled his trial attorney's objection during the prosecution's closing argument. *Id.* Sturkey's appellate attorney did not claim that Sturkey's trial attorney was

ineffective. The Court of Appeals found no merit to Sturkey's claims on direct appeal. *Id.* at 795 (¶17). This Court denied Sturkey's petition for a writ of certiorari on direct appeal and the mandate issued on February 1, 2007.

On May 8, 2012, Sturkey filed his fourth "motion for leave to proceed in the trial court to seek post conviction relief." For the first time, Sturkey submitted a proposed PCR motion in which he claimed that his trial attorney was ineffective because she did not call two witnesses who would have provided alibi testimony in Sturkey's defense. Sturkey attached two purported affidavits, one from each witness, demonstrating that the witnesses did, in fact, have relevant testimony which would have corroborated Stuckey's trial testimony of alibi.

In August 6, 2012, after an answer which was filed by the state, this Court granted Sturkey's request to file a PCR motion in the circuit court. As noted by the Court of Appeal, this Court did not direct that Sturkey had any particular deadline to file his proposed PCR motion. Stuckey filed his PCR motion in the circuit court during January 2013

After a lengthy delay and after this court issued a writ of mandamus to the trial court, the circuit court entered an order summarily denying Sturkey's PCR motion without conducting an evidentiary hearing. The circuit court held that Sturkey's PCR motion was time-barred. Additionally, the circuit court held:

[Sturkey] has failed to prove to this [c]ourt that the information provided in the two affidavits was not “reasonably discoverable” at the time of his trial. To state the obvious, a statement from an alibi witness would most certainly be reasonably discoverable at the time of a trial. Absent some bizarre circumstance, a criminal defendant would unquestionably know whether . . . he was with another person at a location different from the one [that] the prosecution purported him to be. In the present instance, [Sturkey] has provided this [c]ourt with two affidavits which serve as the crux for his claim of ineffective assistance of counsel and his claim of actual innocence. Affiant James Harper claims that [Sturkey] was with him at Harper’s automobile repair shop at the time [Sturkey] was . . . selling cocaine to an undercover police agent. Affiant [Bobbie] Parhm asserts that [Sturkey] briefly visited [his] residence on the day [that Sturkey] . . . sold cocaine. Parhm further states that before leaving, [Sturkey] expressed his intent to go fishing with Harper. Parhm’s affidavit does nothing but attempt to bolster Harper’s affidavit. Regardless, the information contained within the two affidavits was certainly known by [Sturkey] before [his] trial. Also, this [c]ourt notes that before [Sturkey’s] trial, a subpoena was issued to . . . Harper.

The circuit court then noted that the three-year statute of limitations applies to PCR claims based on ineffective assistance of counsel.

II. THE LAW CONTROLLING REVIEW

The law is clear that, “When reviewing a lower court’s decision to deny a petition for post-conviction relief, an appellate court will not disturb the trial court’s factual findings unless they are found to be clearly erroneous. However, where questions of law are raised, the applicable standard of review is de novo.” *Gavin v. State*, 72 So. 3d 570, 572 (¶4) (Miss. Ct. App. 2011) (citing *Moore v. State*, 986 So. 2d 928, 932 (¶13) (Miss. 2008)) (citation omitted). the Court of Appeals mistakenly held that Sturkey’s second PCR motion is barred as a successive writ. *See* Miss. Code Ann. § 99-39-23 (Supp. 2011). The law clearly allows the filing of a successive writ where there is grounds for such filing asserted. Moreover, this Court

clearly found that Sturkey could file the post conviction motion which finding resolves any issue of jurisdiction and successive writ bar. The issue of whether a circuit court erred in denying a PCR motion without an evidentiary hearing is viewed de novo. *Young v. State*, 731 So. 2d 1120, 1122 (¶9) (Miss. 1999). While it is admitted that the right to an evidentiary hearing is not guaranteed, the trial judge had no discretion in allowing an evidentiary hearing in this instance since this court have previously held that when this court allows the filing of a post conviction relief motion in the trial court, a hearing on the motion is evident. *Hymes v. State*, 703 So.2d 258 (Miss 1997). The law state's that "[i]f it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified." *Evans v. State*, 61 So. 3d 922, 927 (¶19) (Miss. Ct. App. 2011) (quoting Miss. Code Ann. § 99-39-11(2) (Rev. 2000)). That issue, however, was a decision for this court, the court which had original jurisdiction over the PCR motion, and which had answered the question by allowing the motion to be presented in the trial court. Sturkey was then entitled to his day in Court to be allowed an opportunity to prove those matters set forth in his pleadings.

III. SUMMARY OF ARGUMENT

After having been granted leave by this court to seek post conviction relief in the trial court, the trial court summarily denied the post conviction relief motion without conducting an evidentiary hearing and after having to have been forced by mandamus to hear the motion. The majority of the Court of Appeals, while seeking a way to affirm the trial court's action, merely asserted that trial court overlooked the PCR motion until being issued a mandamus by this court.

The majority of the Court of Appeals, in making its decision to affirm the trial court's decision, drawn conclusion of fact from the affidavits, against Appellant, without the benefit of any evidentiary hearing testimony and without any opportunity to expand upon the affidavits. By the fact that this court granted Sturkey leave to file his PCR motion in the trial court, Stuckey was entitled by law to an answer from the State of Mississippi and a hearing before the trial court. No discretion was permitted in such instance.

The trial court should have conducted hearing on claim of ineffective assistance of counsel before summarily denying such motion in view of this having granted Appellant leave to file post conviction relief on that claim.

Based upon the claims and authority cited in this brief, along with facts contained in the record of this case, this court should grant certiorari review and reverse and remand this case back to the trial court for evidentiary hearing and to allow Appellant opportunity to call witnesses who have provided sworn affidavits and where Appellant do now have these witnesses who are willing to testify in regards to the issues raised in the post conviction motion and supported by the witnesses affidavits.¹ In the alternative, this case should be reversed and the Appellant granted a new trial on the basis of ineffective assistance of counsel as set out in the post conviction motion.

¹ James Harper and Bobbie G. Parhm provided affidavits attesting to the facts which confirmed Sturkey was not selling drugs at the time of the alleged crime because he was, in fact, with Harper at Harper's shop and went fishing with Harper after leaving the shop. Parhm's affidavit confirms and corroborates that Sturkey was at Harper's shop because Sturkey came to his house and left going to Harper's shop to drop off his car. While the trial court referred to these sworn affidavits as alibi witness statements, both witnesses should have been heard in open court as to their statements and as to their availability to appear and testify at trial. Harper and Parhm should have been able to testify as to whether counsel even contacted them or attempted to contact them or whether they were out of the country and unavailable. The trial court never allowed Sturkey this right even after he had passed the high scrutiny administered by the Supreme Court in considering whether to allow the filing of a post conviction motion in the trial court. Sturkey had earned the right to have his witnesses heard first hand in open court.

IV. ARGUMENT

THE COURT OF APPEALS HAS MISAPPPREHENDED THE FACTS AND/OR THE LAW IN FAILING TO REVERSE AND REMAND WHERE APPELLANT MET THE THRESHOLD REQUIREMENT OF PRESENTING AFFIDAVITS OF WITNESSES AND COURT OF APPEALS DRAWN CONCLUSIONS OF FACTS ON SUCH AFFIDAVITS WITHOUT CONDUCTING A HEARING AND DISREGARDED LAW WHICH MANDATE AN EVIDENTIARY HEARING WHERE THIS COURT GRANTED LEAVE TO FILE POST CONVICTION MOTION IN TRIAL COURT.

Sturkey previously unsuccessfully sought three failed attempts to proceed with post conviction relief in the trial court. Finally, after Sturkey was able to secure the affidavits in support of his claim, which this Court require in accord with law, on his fourth attempt, the this Court granted Sturkey leave to file post conviction relief. This Court do not take the granting of such a motion lightly. The Court has decided that if a post conviction applicant is fortunate enough to meet the threshold requirements of securing leave to proceed with an application for post conviction relief in the trial court, the applicant is entitled to an answer to his PCR motion and an evidentiary hearing.

In Payton v. State, 708 So.2d 559 (Miss. 1998), a case similar to the case at bar, the following facts were presented:

The State argues that the circuit court did not have jurisdiction to entertain a motion for post-conviction relief due to Payton's failure to follow the proper procedures. This argument is without merit because Payton wrote a motion for post-conviction relief to the circuit court and an application for leave to file a post-conviction relief motion to this court granted Payton leave to file his PCR motion and further stated that Payton has presented facts which would entitle him to an evidentiary hearing. Payton then filed a second PCR motion dated February 6, 1995, which was filed on February 10, 1995. The statute makes clear that when this court allows the filing of the motion with the trial court, further proceedings shall occur under the several, enumerated sections of the Post Conviction Relief Act. Miss Code Ann. §99-39-27 (7) (b) (1994). Therefore, the circuit court did have jurisdiction to entertain this motion and grant an evidentiary hearing.

Payton assigns several errors for this Court's consideration, however finding

that all issues other than the claim of ineffective assistance of counsel lack merit we decline to address them.

This decision makes clear that after the Supreme Court grants leave to file post conviction relief in the trial court, especially on a claim of ineffective assistance of counsel, the trial court is required to conduct an evidentiary hearing. The trial court rather than conducting a hearing or other proceeding under the several enumerated sections of the post conviction relief Act contained in Mississippi Code Ann. §99-39-27- (7) (b)(1994) summarily denied the post conviction motion filed by Appellant after the granting of such permission and which the trial court could not legally do. Hymes v. State, 703 So.2d 258 (Miss 1997).

The statute makes clear that when this Court allows the filing of the motion with the trial court, further proceedings shall occur under the several, enumerated sections, including Miss. Code Ann. §99-39-13 which provides for the filing of an answer with the trial court, Miss. Code Ann. §99-39-15 which gives the individual an opportunity to conduct further discovery, Miss. Code Ann. §99-39-17 which provides for an expansion of the record with documents and interrogatory responses and affidavits before the court considers the matter for summary judgment; and Miss. Code Ann. §99-39-19 , allowing for an evidentiary hearing or summary judgment after answers are filed and discovery is complete. The trial court simply cut Sturkey off and prevented him from presenting any additional evidence or having his witnesses to testify and make a record for this court. The Court of appeals, looking for a way to secure their prior affirmance of the direct appeal, simply rubber stamped the trial court's actions.

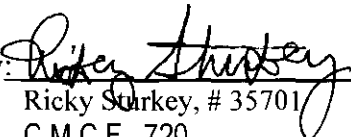
In conclusion, this issue was properly presented to the Court of Appeals in the briefing of the appeal and where the Court of Appeals disregarded the issue and substituted it's conclusions of the facts on the affidavits for the testimony of witnesses who actually made the affidavits. This court should review the decision and reverse and remand this case for an evidentiary

hearing.

CONCLUSION

For the reasons stated, the Appellant respectfully submits that the opinion issued by the Court of Appeals in this case is wrong and should be reheard. Specifically, the Court should grant certiorari review and reverse and remand this case for an evidentiary hearing or for placing this case back on the active docket and conducting a new trial.

Respectfully submitted,

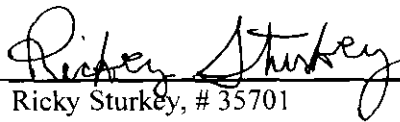
By: 
Ricky Sturkey, # 35701
C.M.C.F., 720
P. O. Box 88550
Pearl, MS 39208

CERTIFICATE OF SERVICE

This is to certify that I, Rickey Sturkey, Appellant pro se, have this mailed, postage prepaid, a true and correct copy of the above and foregoing Petition for Writ of Certiorari and Brief in Support thereof to:

Honorable Jim Hood
Attorney General
P. O. Box 220
Jackson, Mississippi 39205

This, the 8th day of April, 2015

By: 
Ricky Sturkey, # 35701
C.M.C.F., 720
P. O. Box 88550
Pearl, MS 39208

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2013-CP-02081-COA

**RICKEY STURKEY A/K/A RICHARD STURKEY
A/K/A RICKEY LEE STURKEY**

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT:	11/05/2013
TRIAL JUDGE:	HON. VERNON R. COTTEN
COURT FROM WHICH APPEALED:	SCOTT COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	RICKEY STURKEY (PRO SE)
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: STEPHANIE BRELAND WOOD
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
TRIAL COURT DISPOSITION:	MOTION FOR POST-CONVICTION RELIEF DENIED
DISPOSITION:	AFFIRMED - 11/25/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE LEE, C.J., ROBERTS AND CARLTON, JJ.

ROBERTS, J., FOR THE COURT:

¶1. Rickey Sturkey appeals the Scott County Circuit Court's decision to summarily deny his motion for post-conviction relief (PCR). According to Sturkey, the circuit court erred because it did not conduct an evidentiary hearing on his PCR motion after the Mississippi Supreme Court granted Sturkey leave to proceed with his ineffective-assistance-of-counsel claim. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. Following an introduction by a confidential informant, Sturkey sold four "eight balls

Exhibit A

of crack cocaine” to an agent with the Mississippi Bureau of Narcotics (MBN). The MBN agent was wearing a microphone during the transaction. Additional law enforcement officers were nearby in a surveillance van. Sturkey went to trial during October 2003. The MBN agent identified Sturkey as the man who sold him crack cocaine. One of the law enforcement officers in the surveillance van testified that he was familiar with Sturkey’s voice. He identified Sturkey’s voice while listening to the transmission from the MBN agent’s microphone. The prosecution did not elicit any testimony regarding the precise time that the drug transaction occurred on April 18, 2001.

¶3. Sturkey testified in his own defense. Relying on an alibi defense, Sturkey claimed that he had taken his car to a shop for repairs, and he and the mechanic had gone fishing afterward. Sturkey’s wife testified that there had been no drug transaction at her and Sturkey’s mobile home on the date alleged by the prosecution, because no men had visited their home that date. Ultimately, the jury found Sturkey guilty of selling cocaine. The circuit court found that he qualified for enhanced sentencing as a repeat drug offender and a habitual offender as contemplated by Mississippi Code Annotated section 99-19-81 (Supp. 2014), because he had two prior convictions for selling cocaine. Consequently, the circuit court sentenced Sturkey to sixty years in the custody of the Mississippi Department of Corrections. Represented by a different attorney, Sturkey filed a direct appeal. *Sturkey v. State*, 946 So. 2d 790, 791 (¶1) (Miss. Ct. App. 2006). Sturkey raised three issues on direct appeal. According to Sturkey, the circuit court erred when it: (1) deprived him of his right to be represented by his attorney of choice; (2) sustained the prosecution’s hearsay objection regarding a purported statement by the confidential informant, who did not testify at trial; and

(3) overruled his trial attorney's objection during the prosecution's closing argument. *Id.* Sturkey's appellate attorney did not claim that Sturkey's trial attorney was ineffective. This Court found no merit to Sturkey's claims on direct appeal. *Id.* at 795 (¶17). The Mississippi Supreme Court denied Sturkey's petition for a writ of certiorari, and the mandate issued on February 1, 2007.

¶4. The record reflects that Sturkey unsuccessfully sought the supreme court's leave to file a PCR motion at least three times. He filed his first unsuccessful request during September 2008. A different attorney submitted a proposed PCR motion on Sturkey's behalf and claimed: (1) the circuit court deprived Sturkey of his right to be represented by his attorney of choice;¹ and (2) Sturkey's sentence was illegal. Nearly simultaneously, Sturkey filed a pro se proposed PCR motion. Sturkey repeated his claims that he was denied his counsel of choice and that his sentence was illegal. Additionally, he claimed the indictment was defective, and there was insufficient evidence that he was guilty of selling cocaine. Sturkey also argued that his trial attorney was ineffective because she did not object to "the State's failure to produce the confidential informant as a witness." Most significant to the PCR motion that is presently before us, neither of Sturkey's proposed PCR motions included a claim that Sturkey's trial attorney was ineffective because she did not call two potential

¹ Sturkey originally retained attorney Kevin Camp to represent him. However, Camp was called to active duty in the United States Army during January 2003. Camp turned over representation of his files to his associate, Jeanine Carafello. On October 15, 2003, which was the date of his trial, Sturkey informed the circuit court that he wanted to discharge Carafello. The circuit court denied Sturkey's request because he did not have any particular complaint with Carafello's representation. We found no merit to Sturkey's claim on direct appeal. *Sturkey*, 946 So. 2d at 792-944 (¶¶5-8).

alibi witnesses. In October 2008, the supreme court denied Sturkey's request for leave to proceed in the circuit court.

¶5. Sturkey filed his second request for leave to file a PCR motion in May 2010. In his prospective PCR motion, Sturkey essentially claimed that his sentence was illegal because the indictment improperly charged him as a habitual offender and a repeat drug offender. The supreme court found that Sturkey's second request for leave was procedurally barred as a successive application. Consequently, the supreme court denied Sturkey's second request.

¶6. In December 2011, Sturkey filed his third request for leave to file a PCR motion in the circuit court. This time, Sturkey repeated his claim that he was improperly indicted as a habitual offender and a repeat drug offender. In February 2012, the supreme court dismissed Sturkey's third request. The supreme court warned Sturkey "that any future frivolous filings may subject [him] to sanctions."

¶7. Three months after the supreme court's warning, Sturkey filed his fourth "motion for leave to proceed in the trial court." For the first time, Sturkey submitted a proposed PCR motion in which he claimed that his trial attorney was ineffective because she did not call two witnesses who would have allegedly provided alibi testimony in Sturkey's defense. Sturkey attached two purported affidavits from the two witnesses. However, he did not attach any affidavits supporting his claim that his trial attorney's performance was deficient because she refused to call the two witnesses. In August 2012, the supreme court granted Sturkey's request to file a PCR motion in the circuit court. However, the supreme court did not instruct Sturkey that he had any particular deadline to file his proposed PCR motion. It appears as though Sturkey filed his PCR motion in the circuit court during January 2013, but

for some unknown reason, it escaped the circuit court's attention. From that point forward, the record is exceedingly confusing.

¶8. Sturkey filed a petition for a writ of mandamus on April 2, 2013. Within his petition, Sturkey claimed that he had filed his PCR motion on March 28, 2012. But that date is inconsistent with the fact that the supreme court granted Sturkey's fourth request for leave to file a PCR motion in August 2012. Consequently, Sturkey's PCR motion could not predate the supreme court's order by approximately five months. However, Sturkey also stated that the "Scott County Circuit Clerk just filed and docketed" his PCR motion on January 31, 2013. On April 25, 2013, the supreme court dismissed Sturkey's petition without prejudice because he did not sufficiently demonstrate that he had filed a PCR motion or that the circuit court had taken one under advisement.

¶9. Approximately two weeks later, Sturkey filed a second petition for a writ of mandamus. In his second petition, Sturkey claimed he filed his PCR motion on September 28, 2012. Again, the supreme court dismissed Sturkey's petition without prejudice because he failed to demonstrate that he had filed a PCR motion in the circuit court.

¶10. Sturkey filed his third petition for a writ of mandamus during August 2013. This time, he repeated his first claim that he had filed his PCR motion during March 2012. Sturkey attached a copy of his PCR motion to his third petition, but the attached copy was not stamped as though it had been filed in the circuit court. On October 30, 2013, the supreme court granted Sturkey's petition. The supreme court also ordered the circuit court to "rule on Sturkey's [PCR motion] within thirty days of the entry of this order." The supreme court's order was filed in the circuit court on November 1, 2013.

¶11. Five days later, the circuit court entered an order summarily denying Sturkey's PCR motion without conducting an evidentiary hearing. The circuit court held that Sturkey's PCR motion was time-barred. Additionally, the circuit court held:

[Sturkey] has failed to prove to this [c]ourt that the information provided in the two affidavits was not "reasonably discoverable" at the time of his trial. To state the obvious, a statement from an alibi witness would most certainly be reasonably discoverable at the time of a trial. Absent some bizarre circumstance, a criminal defendant would unquestionably know whether . . . he was with another person at a location different from the one [that] the prosecution purported him to be. In the present instance, [Sturkey] has provided this [c]ourt with two affidavits which serve as the crux for his claim of ineffective assistance of counsel and his claim of actual innocence. Affiant James Harper claims that [Sturkey] was with him at Harper's automobile repair shop at the time [Sturkey] was . . . selling cocaine to an undercover police agent. Affiant [Bobbie] Parhm asserts that [Sturkey] briefly visited [his] residence on the day [that Sturkey] . . . sold cocaine. Parhm further states that before leaving, [Sturkey] expressed his intent to go fishing with Harper. Parhm's affidavit does nothing but attempt to bolster Harper's affidavit. Regardless, the information contained within the two affidavits was certainly known by [Sturkey] before [his] trial. Also, this [c]ourt notes that before [Sturkey's] trial, a subpoena was issued to . . . Harper.

The circuit court then noted that the three-year statute of limitations applies to PCR claims based on ineffective assistance of counsel.

STANDARD OF REVIEW

¶12. In reviewing a circuit court's decision to deny a PCR motion, an appellate court will not disturb the circuit court's factual findings unless they are clearly erroneous. *Rowland v. State*, 42 So. 3d 503, 506 (¶8) (Miss. 2010). We review questions of law de novo. *Id.*

ANALYSIS

¶13. Sturkey claims the circuit court erred because it did not grant him an evidentiary hearing. According to Sturkey, because the supreme court had given him leave to file his

PCR motion, the circuit court was obligated to conduct an evidentiary hearing regarding his claim that he received ineffective assistance of counsel.

¶14. A circuit court may summarily dismiss a PCR motion “[i]f it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief[.]” Miss. Code Ann. § 99-39-11(2) (Supp. 2014). However, a circuit court may not summarily dismiss a PCR motion if the supreme court has given the movant leave to proceed. Miss. Code Ann. § 99-39-11(11) (Supp. 2014); *see also Hymes v. State*, 703 So. 2d 258, 260 (¶8) (Miss. 1997). Instead, the circuit court must review the PCR motion under Mississippi Code Annotated sections 99-39-13 through 99-39-23 (Rev. 2007 & Supp. 2014). *Hymes*, 703 So. 2d at 260 (¶8).

¶15. We disagree with Sturkey’s position that the supreme court’s decision to grant his request for leave to proceed in the circuit court is the equivalent of a guarantee to an evidentiary hearing. Mississippi Code Annotated section 99-39-19(1) (Supp. 2014) provides:

If the motion is not dismissed at a previous stage of the proceeding, the judge, after the answer is filed and discovery, if any, is completed, shall, upon a review of the record, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice shall require.

Although the circuit court did not dispose of Sturkey’s PCR motion after the State filed an answer and the parties completed discovery, section 99-39-19(1) stands for the principle that a movant is not automatically entitled to an evidentiary hearing simply because the supreme court granted the movant’s request for leave to proceed in the circuit court.

¶16. Furthermore, the unique procedural circumstances of Sturkey’s case bear discussion. Sturkey filed three petitions for a writ of mandamus in the supreme court. The supreme court

dismissed the first two without prejudice, because there was no indication that Sturkey had actually filed his PCR motion in the circuit court. In his third petition for a writ of mandamus, Sturkey requested that the supreme court order the circuit court to “rule on” his PCR motion. Sturkey did not ask the supreme court to order the circuit court to conduct an evidentiary hearing. The supreme court granted Sturkey’s motion and his specific request. That is, the supreme court ordered the circuit court to “rule on Sturkey’s [PCR motion] within thirty days of the entry of [the supreme court’s] order.” The supreme court did not order the circuit court to conduct an evidentiary hearing. The circuit court complied with the supreme court’s order. Even if we were to find that the circuit court erred because it did not conduct an evidentiary hearing, the circuit court’s error would be harmless because there is plainly no merit to Sturkey’s underlying claim.

¶17. Essentially, Sturkey claimed that his trial attorney was ineffective because she did not call two witnesses who would have bolstered Sturkey’s alibi defense. To support his claim, Sturkey attached two purported affidavits: one from James Harper, and the other from Bobbie Parhm. Harper’s affidavit states:

On April 18, 2001, . . . Sturk[ey] came to my repair shop in his car at 1:50 p.m. to have it repaired. He left for approximately 15 minutes and returned the car at 2:05 p.m. [Sturkey] remained at the shop with me the entire time until I finished repairing his car at 2:55 p.m. We then left my shop and went fishing the length of the day until late that evening. My assistant made out a receipt which I gave [Sturkey] after he paid me in full for his repairs.

Parhm’s affidavit says, “Stur[key] came to my house on April 18, 2001, after he dropped his car off at James Harper’s repair shop. He stayed a few minutes and left going back to Mr. Harper’s shop. He stated when he left that he and Mr. Harper were going fishing.” “In cases

involving post-conviction collateral relief, ‘where a party offers only his affidavit, then his ineffective[-]assistance claim is without merit.’” *Coleman v. State*, 979 So. 2d 731, 735 (¶15) (Miss. Ct. App. 2008) (quoting *Vielee v. State*, 653 So. 2d 920, 922 (Miss. 1995)). Although Sturkey offered two additional affidavits other than his own, neither of those affidavits pertains to Sturkey’s precise allegation. That is, neither affidavit indicates that Sturkey’s trial attorney’s performance was deficient in any way. Similarly, neither affidavit indicates that the affiant was available to testify, but Sturkey’s trial attorney neglected to call them.

¶18. It is unclear exactly why the supreme court granted Sturkey’s fourth request for leave to proceed in the circuit court. However, it is plainly apparent that Sturkey could have raised his claim within the three-year statute of limitations set forth in Mississippi Code Annotated section 99-39-5(2) (Supp. 2014).² Section 99-39-5(2) provides that a PCR motion “shall be made within three . . . years after the time in which the petitioner’s direct appeal is ruled upon by the Supreme Court of Mississippi[.]” The supreme court denied Sturkey’s petition for a writ of certiorari on January 11, 2007. The mandate issued on February 1, 2007. Sturkey filed his fourth and most recent request for leave to file a PCR motion during May 2012. As the circuit court discussed in its order denying Sturkey’s PCR motion, Sturkey knew that Harper and Parhm were potential alibi witnesses well within the three-year statute of

² The first ground listed as a justification for seeking PCR under section 99-39-5(1)(a) is “[t]hat the conviction or the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi.” Clearly, a trial attorney’s failure to provide minimally effective representation to an accused qualifies as a violation of the accused’s rights under the Sixth Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution.

limitations. The supreme court has held that it is permissible to “attach reasonable time limitations to the assertion of federal [and state] constitutional rights.” *Cole v. State*, 608 So. 2d 1313, 1319 (Miss. 1992). Sturkey’s ineffective-assistance claim in his latest PCR motion was simply untimely.

¶19. Sturkey did not claim that Harper’s and Parhm’s potential testimonies were newly discovered evidence. To qualify as newly discovered evidence, the evidence must meet the following criteria: (1) the defendant became aware of it following his trial, (2) it could not have been discovered sooner by diligence, and (3) it would probably produce a different result in a new trial. *Parker v. State*, 71 So. 3d 620, 625 (¶15) (Miss. Ct. App. 2011). Sturkey was aware of Harper and Parhm prior to his trial.

¶20. Moreover, the circuit court noted that Sturkey’s trial attorney subpoenaed Harper during Sturkey’s trial. It is unclear why Harper did not appear to testify in Sturkey’s defense. As for Parhm’s affidavit, Sturkey’s attorney could have chosen not to subpoena Parhm because he did not have much to offer Sturkey’s defense. Parhm’s purported affidavit is inconsistent with Harper’s, and it contradicts Harper’s version of events. Harper’s affidavit says that Sturkey remained at the shop after he left his car there to be repaired. But Parhm’s affidavit says that Sturkey visited him after Sturkey left his car at Harper’s shop. Beyond that, Parhm’s affidavit merely states that Sturkey said he and Harper were going to go fishing later. In other words, Parhm did not affirmatively add to Sturkey’s alibi defense.

¶21. To prove ineffective assistance of counsel, Sturkey was obligated to prove: (1) his counsel’s performance was deficient, and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). “Considering the attorney’s overall performance, the

decisions that fall within the realm of trial strategy ‘cannot give rise to an ineffective[-]assistance[-]of[-]counsel claim.’” *Porter v. State*, 963 So. 2d 1225, 1230 (¶18) (Miss. Ct. App. 2007) (quoting *Jackson v. State*, 815 So. 2d 1196, 1200 (¶8) (Miss. 2002)). An attorney’s decision “to not call certain witnesses may be excused based on a belief that the information would not be helpful[.]” *Id.* And as for Harper, Sturkey’s trial attorney had subpoenaed him. Apparently, Harper did not appear as summoned, or Sturkey’s trial attorney evaluated Harper’s proposed testimony and decided that it would not be helpful to Sturkey’s case. Sturkey’s trial attorney made “a genuine effort to locate or evaluate [Harper.]” *Id.* That Harper did not testify at Sturkey’s trial was not necessarily any indication that Sturkey’s trial attorney rendered ineffective assistance of counsel. *See id.*

¶22. In *Porter*, this Court held that a circuit court erred when it summarily dismissed a PCR motion after the supreme court granted Porter’s request for leave to file it in the circuit court. *Id.* at 1227 (¶4). However, we found that the circuit court’s error was ultimately harmless. *Id.* Similarly, we find that any error that resulted from the circuit court’s decision to forgo an evidentiary hearing was harmless. Sturkey’s PCR motion was untimely. “[M]erely raising a claim of ineffective assistance of counsel is [in]sufficient to surmount the procedural bar.” *Barnes v. State*, 949 So. 2d 879, 881 (¶7) (Miss. Ct. App. 2007). The three-year statute of limitations applies to claims that a movant received ineffective assistance of counsel. *Id.* (citing *Kirk v. State*, 798 So. 2d 345, 346 (¶6) (Miss. 2000)). Nothing prevented Sturkey from raising his claim in a timely manner. Additionally, nothing prevented Sturkey from raising his claim in one of his three previous requests for leave to file a PCR motion. Because Sturkey neglected to do either, the circuit court did not err when it complied with

the supreme court's order to rule on Sturkey's PCR motion and summarily denied it. Any error that may have resulted from the circuit court's failure to order the State to respond to Sturkey's PCR motion is harmless.

¶23. THE JUDGMENT OF THE SCOTT COUNTY CIRCUIT COURT DENYING THE MOTION FOR POST-CONVICTION RELIEF IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO SCOTT COUNTY.

LEE, C.J., IRVING AND GRIFFIS, P.JJ., ISHEE, CARLTON, MAXWELL AND FAIR, JJ., CONCUR. BARNES, J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. JAMES, J., CONCURS IN PART WITHOUT SEPARATE WRITTEN OPINION.